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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 683.

THE UNITED STATES, *Petitioner*,

v.

HERBERT RIVINGTON PYNE, GRAFTON HOWLAND PYNE, MARY PYNE FILLEY, and PERCY R. PYNE, JR., EXECUTORS OF THE ESTATE OF PERCY R. PYNE, *Respondents*.

On Writ of Certiorari to the U. S. Court of Claims.

BRIEF FOR THE RESPONDENTS.

ALLEN G. GARTNER,
Attorney for Respondents.

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OPINION BELOW.

The special findings of fact and opinion (R. 9-18) are reported in 35 F. Supp. 81.

JURISDICTION.

The judgment of the Court of Claims was entered October 7, 1940 (R. 19). The petition for a writ of certiorari was filed January 7, 1941 and granted February 17, 1941 (R. 21). The jurisdiction of this Court is conferred by Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED.

Whether the estate of a decedent, who was engaged in business prior to his death, and continued the business during administration, may deduct from gross income that portion of the attorney's fees paid for services rendered that are attributable to the business operations of the estate, where the balance of the attorney's fees are attributable to the administration of the estate and therefor, not deductible from gross income.

STATUTE INVOLVED.

Revenue Act of 1934, c. 277, 48 Stat. 680:

> "Sec. 162. *Net Income.* (26 U. S. C. A., Sec. 162) The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual,—
>
> Sec. 23. *Deductions from Gross Income.* (26 U. S. C. A., Sec. 23)
>
> In computing gross income there shall be allowable as deductions:
>
> (a) *Expenses.*—
>
> (1) *In general.* All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation, (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

STATEMENT.

The Court of Claims made Special Findings of Fact (R. 9-13), based upon the evidence, which included the testimony of the attorney whose fee, paid in 1934, represents the

deduction from income involved in this proceeding. Additional facts are found in the opinion rendered by the Court.

Respondents are the executors under the will of Percy R. Pyne, who died August 22, 1929. They were authorized under the will to sell estate property, reinvest the proceeds, participate in reorganization of corporations in which decedent held an interest, collect the income, distribute it and corpus as provided in the will and perform other duties. After payment of specific bequests, the residue passed to trustees under the will for the benefit of named parties. Under this latter provision, trusts were set up in 1935 (R. 9), at which time the residue passed to the trustees, who were also the executors and whose duties were similar to those of the executors, as outlined above (R. 10).

Prior to and at the time of his death, the decedent was engaged in business as a financier and investor, maintaining an office where he employed an office manager and an average of six clerks. After his death, substantially the same office set-up was continued and maintained by the executors and is maintained at the present time by the trustees. The decedent's estate was valued at approximately $35,000,000 at his death in 1929 and included 129 different issues of stock, 118 different issues of bonds and certain real estate (R. 12).

The executors were the three sons and a daughter of the decedent, all of whom had had but little business experience (R. 13). The decedent's death having occurred just before the economic depression, beginning in 1929, the executors, after their appointment, employed an attorney to advise them regarding matters both economic and legal that arose in the business activities of the estate, which included estate and inheritance taxes, the acquisition and disposal of the estate's securities and various matters pertaining to companies in which the estate held investments (R. 13).

A substantial part of the decedent's estate was invested in stock of the National City Bank and in the Woodward

Iron Company (R. 12). At the decedent's' death, the bank stock was selling at $440. per share, but by 1934 had declined in value to $15. or $20. per share. The Woodward Iron Company, in which the estate had an investment of about $2,000,000. went into the hands of a receiver. The executors and their attorney busied themselves to save what they could in this situation by the organization of a committee of bondholders and stockholders for the purpose of taking over the property (R. 17). During 1934, the executors sold the estate's holdings in a number of companies (R. 17), sustaining a net loss therefrom of $677,272.18, but was limited by statute to a deduction of only $2,000. (R. 11).

The executors did not have any contract with the attorney for his services, but he was paid from time to time as he needed the money and requested payment, and as it suited the convenience of the estate (R. 13). During the period from the time he was engaged in 1929 to and including 1935, he was paid a total in fees of $450,000. In the year 1934, here involved, he was paid $40,000 for legal services and $155.60 as reimbursement for expenses incurred (R. 13), or a total of $40,155.60.

The estate kept its books and rendered its returns on the cash receipts and disbursements basis (R. 11). The income tax return for 1934 reported gross income of $154,966.23, consisting principally of rents, dividends and interest. Included among the claimed deductions was an item of expenses, $75,470.20, consisting of salaries to office employees, $15,909.96; office rent, $4,931.32; office expenses, $3,474.11; and attorney's fees and expenses, $40,155.60—the item here in controversy. In his audit of the return, the Commissioner of Internal Revenue allowed all of the expenses itemized above except the attorney's fees and expenses of $40,155.60, which he disallowed on the ground that such amount was not deductible as a business expense, but was a charge against corpus or an administration expense of the estate, resulting in a tax deficiency of $15,309.20 (R. 11). The executors duly paid this tax and filed claim for its

refund on the ground that the estate was engaged in business, therefore, the attorney's fees constituted an expense incurred in connection with the conduct of the business affairs of the estate. Alternatively, it was claimed that, if, as contended by the taxing authorities, the expense was an administration expense of the estate, the sum would have been deductible from the value of the estate for estate tax purposes and that subject having been closed in 1931, the Government thereby became unjustly enriched by having collected an estate tax on the value of the estate without having allowed a deduction for the attorney's fees in question (R. 12).

The Federal estate tax matters were determined and closed in 1931 (R. 10). However, some matters pertaining to the payment of these taxes arose in 1934, the year here involved and it was necessary for the attorney to perform some service in securing extensions of time for the payment of these taxes and other matters relating thereto, though such services were of a relatively minor character, as compared with the attorney's other services in advising the executors with respect to the general operation of the business affairs of the estate. In general, the operations of the estate continued in substantially the same manner after the decedent's death as before that time (R. 13).

After rejection of the claim for refund of 1934 income taxes, suit was duly filed in the Court of Claims, where, based upon the evidence, that Court found as a fact that both the decedent and his estate were engaged in business and that the payment of $40,155.60 for the attorney's services—

> "was paid principally for services in connection with the business operations of the estate,"

in the amount of $38,155.60. The balance of $2,000.00 being applicable to expense of administering the estate (R. 12, 13) was, therefore, held not deductible from gross income. Upon this finding, the Court awarded judgment for

the respondents in the amount of tax resulting from this apportionment of the amount claimed as a deduction.

The Court's decision, having been based upon the issue involving the deduction of business expenses, made it unnecessary to pass upon the alternative issue raised in the claim for refund and in the respondent's petition.

SUMMARY OF THE ARGUMENT.

This controversy arose from the refusal of the Commissioner of Internal Revenue to allow the whole or any part of the amount paid in 1934 for an attorney's services of an economic and legal nature, which were claimed as a business deduction by the taxpayer. The Commissioner allowed all other expenses consisting of office rent, management and salaries of employees, which he would not have done had he not recognized the fact that the taxpayer was engaged in carrying on a business.

There have been numerous cases involving the deduction of business expenses that have reached the courts and the Board of Tax Appeals. In every case, the ultimate decision rested on a factual determination of the question whether the taxpayer was engaged in business. As recently as the case of *Higgins* v. *Commissioner,* 85 L. Ed. 475, 478 (adv. sheets) No. 253, October, 1940 Term, this Court held that to determine whether the activities of a taxpayer are "carrying on a business" requires an examination of the facts in each case.

In the record brought before this Court by the petitioner, appear the pleadings, the special findings of fact and the opinion of the Court of Claims. None of the evidence upon which the Court based its findings of fact is contained in the record. These findings clearly reflect the evidence showing that the taxpayer continued the business in which the decedent was engaged at the time of his death and itself was engaged in business while also administering the estate. Based upon this showing, the Court apportioned the attorney's fees between business expense and administration expense.

The respondents contend that the petitioner is here asking this Court to reverse the factual determination of the Court of Claims, without having any of the evidence before it.

The respondents further contend that the facts found by the lower Court received their proper application to the statutory provisions of the revenue act authorizing the deduction of business expenses by a taxpayer carrying on business, therefore, the judgment of the Court below should be affirmed.

ARGUMENT.

Attorney's Fees Paid for Services Rendered in Connection With a Taxpayer's Business Are Deductible from Gross Income.

The taxpayer was an estate in process of administration during 1934. By statutory provision, the net income of an estate is computed in the same manner and on the same basis as an individual. Sec. 162, Revenue Act of 1934, quoted herein at page 2, *supra*.

Net income results from gross income, less statutory deductions, among which are authorized the deduction comprising all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business, including a reasonable allowance for salaries or other compensation. Sec. 23 (a) (1), Revenue Act of 1934, quoted at page 2, *supra*.

Where attorney's fees and legal expenses are incurred in the handling of subjects directly connected with, or proximately resulting from the taxpayer's business, they constitute business expenses and are deductible from income. *Kornhauser* v. *U. S.*, 276 U. S. 145, 72 L. Ed. 505; *Kales* v. *Commissioner*, 101 F. (2d) 35; *Richard Croker, Jr.*, 12 B. T. A. 408; *The Ohio Sheep & Wool Growers' Assn. Co.*, 14 B. T. A. 911; *Saks & Co.*, 20 B. T. A. 1151.

The facts in the instant case are stated in the trial court's findings of fact and opinion. The evidence is not before this court and the petitioner's failure to include any of the

evidence in the record, although permitted by statute to do so, clearly demonstrates the petitioner's conclusion that the trial court's findings are in accordance with the evidence adduced at the trial. Neither party to the suit filed exceptions to the report of the Court Commissioner from which the Court made its findings of fact.

The Court found as a fact (R. 12) that prior to and at the time of the decedent's death;

> "he was engaged in business as a financier and investor, maintaining an office where he employed an office manager and an average of six clerks. After his death substantially the same office was maintained by the executors and is maintained at the present time by the trustees under the will."

The executors continued the decedent's business during the period of administration of the estate, which included the year 1934, here involved; the power granted them under the will being equal to that the decedent had during his lifetime. As to continuation of the business, the Court found as a fact (R. 13):

> "In general, the operations of the estate continued in substantially the same manner after the decedent's death as before that time up until the time the trusts were set up."

These facts conclusively demonstrate the continuation of the decedent's business in the hands of the executors and establish the fact that the estate itself was engaged in business. These findings are clearly consistent with the action of the Bureau of Internal Revenue, where, in the audit of the taxpayer's return for 1934, it allowed as deductions the entire expense consisting of office rent, salaries and miscellaneous expense incurred in maintaining the business office of the estate (R. 11).

In *Higgins* v. *Commissioner, supra,* this Court said:

> "The Bureau of Internal Revenue has this duty of determining what is carrying on business, subject to

reexamination of the facts by the Board of Tax Appeals and ultimately to review on the law by the courts on which jurisdiction is conferred."

In the instant case, the Bureau determined the estate was carrying on business and allowed all expenses as a deduction, except attorney's fees, which it considered to be an expense of administering the estate and, therefore, not deductible from gross income. However, "upon reexamination of the facts," as pointed out in the *Higgins* case, by the Court of Claims, that court found that the Bureau had erred and in its findings, apportioned the attorney's fees between that part attributable to the business operations of the estate (\$38,155.60) and that part attributable to administration of the estate, (\$2,000).

The situation here is somewhat similar to that in the *Higgins* case, where his real estate activities were held to constitute a business. There, the activities were conducted entirely by a "board of control," who made all decisions as to the rental and upkep of properties and handled all details in connection with these matters. Here the activities were conducted by the four respondents, who devoted their activities to the making of decisions and taking action where required, in all matters pertaining to the business operations of the estate. In its decision in the *Higgins* case, this Court placed more emphasis upon the "activities" of the taxpayer than the nature or character of the investments. The Board of Tax Appeals did the same in reaching its decision. The fact that here the taxpayer's investments were principally securities, does not affect the taxpayer's right to the deduction claimed, where the facts disclose "activities" that were found by the lower Court to be attributable to the business operations of the estate.

It is a fixed rule in the judicial field of taxation that, with certain statutory exceptions, the burden of proving a determination of tax liability by the Commissioner of Internal Revenue to be erroneous, is placed upon the taxpayer and this rule prevails in the Court of Claims as well as in

the Board of Tax Appeals. The taxpayer has met the burden in this case with evidentiary proof. The trial court weighed the evidence and declared the result in its finding that the estate was engaged in business. Upon review, the court's finding must stand unless it fails to be supported by the evidence and in the absence of such failure, the reviewing court may not substitute its judgment of the facts for that of the trial court. *Helvering* v. *Kehoe,* 309 U. S. 277, 279, 84 L. Ed. 751, 753; *Helvering* v. *Rankin,* 295 U. S. 123, 131, 79 L. Ed. 1343, 1349; *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 206, 80 L. Ed. 154, 157; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40, 81 L. Ed. 491, 492.

The attorney's services were engaged shortly after the decedent's death in 1929 and were continued until 1935. His services during this period were devoted to matters pertaining to both business operations and to administration of the estate. The respondents were the three sons and a daughter of the decedent, all of whom had had but little business experience. Upon the death of the decedent, they were not only confronted with the necessity of carrying on the decedent's business, but were equally, if not more, confronted with the necessity of meeting and solving serious economic problems resulting from the depression that had its inception shortly after the decedent's death. These unprecedented conditions made it necessary for them to change investments from one type to another, to take an active part in some of the enterprises in which the estate held investments and to exercise their best judgment in all of these matters with the aid of the attorney's advice.

At the time of the decedent's' death in 1929, all property values were at their highest point. The assets of the estate were required to be valued for estate and inheritance tax purposes at market prices that fell to comparatively small values when the large amount of estate and inheritance taxes were payable. To meet these payments, they were required to liquidate many of the assets and their attorney's counsel in these matters was as essential to the exer-

cise of their best collective judgment, as would have been the case in any going business confronted with similar circumstances.

During the earlier part of the period of years the attorney was employed, from 1929 to 1931, the vast majority of the estate's administration matters, including estate and inheritance taxes both Federal and State, were definitely settled and closed, leaving very little to be done in connection with those subjects after 1931. During 1934, the year here involved, the greater part of his services were devoted to the business operations of the estate and only a relatively small part to administration matters. Upon the question of the division of his services between the two general classes, the trial court found as a fact (R. 13):

> "during the period from 1931 to 1935, including 1934, (the year here involved) it was necessary for the attorney of the executors to perform some service in securing extensions of time for the payment of these (estate and inheritance) taxes and other matters relating thereto, though such services were of a relatively minor character as compared with the attorney's other services in advising the executors with respect to the general operation of the business affairs of the estate."

In view of the statutory provision authorizing the deduction of business expenses from income and the fact that the taxpayer was carrying on a business although a portion of the attorney's services were devoted to matters pertaining to the administration of the estate, the Court determined from the evidence what apportionment of the attorney's fees was proper and so stated in the following finding of fact (R. 13):

> "The amount paid for the attorney's services in 1934 and which is here claimed as a deduction, **was paid principally for services in connection with the business operations of the estate,** and to a minor extent for services with respect to the final disposition of estate tax and similar matters, the reasonable value of the services of the latter character, based upon a comparison of the former with the latter on the basis of the

total compensation paid, not being in excess of $2,000.00."

It is not unusual for trial courts to allocate expenses paid for services between deductible and non-deductible items. *Higgins* v. *Commissioner, supra.* In that case, the Board of Tax Appeals apportioned the taxpayer's total expenses between his business and non-business operations, which action received the approval of the Circuit Court of Appeals, Second Circuit, and later, of this Court in a recently rendered opinion. The Board found from the evidence that the taxpayer's activities with reference to his real estate investments amounted to carrying on business, but that his activities regarding his stocks and bonds did not and apportioned his total expenses between his real estate and his securities investments, resulting in the former constituting a deductible business expense, and the latter a personal expense and not deductible.

In this case, the Court of Claims found from the evidence that the taxpayer's activities constituted the operation of a business concurrently with the administration of the estate and apportioned the attorney's fees between business expense and administration expense upon the basis of the amount of the attorney's services devoted to business operations in relation to administration matters.

The deduction of attorney's fees paid by a taxpayer in legal actions brought by the Government to collect additional income taxes, was considered by the Sixth Circuit Court of Appeals in *Kales* v. *Commissioner, supra.* There, the issue was whether the payment constituted a business or a personal expense, which, in turn, depended upon a determination of the question whether she was engaged in business. The Board of Tax Appeals, having upheld the Commissioner's determination that it was a personal expense, the taxpayer sought a review of the decision, contending that the Board had erred in its failure to find that the taxpayer was engaged in business. After an examination of the evidence in the record before it, the Circuit Court concluded

that the Board's finding was erroneous and not supported by the evidence, stating at page 39:

> "While the petitioner's endeavor to make proof of her activities during the earlier years of the period 1916 to 1930 was somewhat curtailed by the view of the examining board member that, since the questions related to expenses for the years 1928 and 1930, activities of those years only were important, there is sufficient evidence in the record, however, and quite enough likewise in the evidentiary findings of the Board, to show her general activity in relation to her affairs during the entire period."

The Circuit Court, after summarizing the evidence showing the taxpayer's activities that established the fact that the taxpayer was carrying on a business, held that she was entitled to deduct the attorney's fees as a business expense upon the grounds that—

> "The cost of the protection and recovery of income when income results in whole or in part from business activities is a business expense within the meaning of the Act."

In *Kornhauser* v. *U. S., supra,* this court considered and reversed a decision of the Court of Claims, holding that a payment of attorney's fees incurred in successfully defending a suit for an accounting of alleged partnership income was a personal expense and not directly connected with the taxpayer's business activities. Upon the facts stated in the taxpayer's petition to the Court of Claims, to which the Government demurred, this Court found that he was actively engaged in business when he collected the income involved in the accounting suit and, therefore, was legally entitled to deduct the attorney's fees, stating:

> "In the application of the act we are unable to perceive any real distinction between an expenditure for attorney's fees made to secure payment of the earnings of the business and a like expenditure to retain such earnings after their receipt. One is as directly connected with the business as the other."

While these cases differ somewhat from the instant case, in that they involve the deduction of fees paid for legal services rendered in the handling of suits in court, they firmly establish the principle that where the facts disclose the activities of the taxpayer amount to the carrying on of a business, the fees are deductible from the income produced in the operation of the business. **Legal services of an advisory nature are just as much essential to the operation of a business as are services rendered in matters requiring litigation in court proceedings.** Based upon these principles, the respondents contend that the Court of Claims correctly applied the governing facts to the law in the case at bar, resulting in the judgment awarded in their behalf.

CONCLUSION.

The trial court's findings of fact are in accord with the evidence and its application of the law is within the scope of the statute.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

ALLEN G. GARTNER,
Attorney for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 683.—October Term, 1940.

The United States, Petitioner,
vs.
Herbert Rivington Pyne, Grafton Howland Pyne, Mary Pyne Filley, and Percy R. Pyne, Jr., Executors of the Estate of Percy R. Pyne.

On Writ of Certiorari to the Court of Claims.

[April 28, 1941.]

Mr. Justice Black delivered the opinion of the Court.

The question presented is whether upon this record the Court of Claims[1] committed error in concluding that respondents, as executors, were, in computing their federal income tax, entitled to deduct expenses properly incurred in the administration of an estate, Congress having provided that such a deduction could be taken only by individuals, estates, or trusts engaged in "carrying on . . . business." Revenue Act of 1934, §§ 23(a), 161, 162. Compare *City Bank Farmers Trust Co.* v. *Helvering*, just announced.

In computing the 1934 net income of the estate, respondents claimed a deduction of $40,000 for fees paid to the estate's attorney during the taxable year. The Commissioner of Internal Revenue disallowed the deduction; the respondents paid under protest, and filed suit for refund in the Court of Claims. Their complaint alleged that "The payment of attorney's fees and the claim for allowance thereof as a deduction from gross income is predicated upon the contention that the tremendous size of the corpus of the estate and the proper administration thereof constituted the operation of a business and the employment of an attorney as counsel to guide the executors in the handling of the affairs of the estate was just as much a necessary expense of the estate as is incurred in the operation of any commercial business engaged in the manu-

[1] 35 F. Supp. 81.

facturing or selling of commodities." The court made detailed findings of fact, and as its single conclusion of law stated that the respondents should recover.

We recently stated in *Higgins* v. *Commissioner*, 311 U. S. —, that determination of what amounts to carrying on business requires examination of the facts in each case. In this case, the record before us contains the findings of the Court of Claims, a conclusion of law, and an opinion summarizing the findings of fact and indicating the reasons which prompted the court to reach its conclusion of law. The most that can be said of the findings of fact is that the court was of the opinion that the facts found showed that the activities of the executors were such as to meet certain criteria set out in the opinion as determinative of what constituted carrying on business. For what the court found as a fact was that the decedent, prior to his death "was engaged in business as a financier and investor, maintaining an office where he employed an office manager and an average of six clerks. . . . In general, the operations of the estate continued in substantially the same manner after the decedent's death as before. . . ." In addition the court found that the attorney employed by the executors "was called upon to advise them with reference to matters both legal and economic that arose in the business activities of the estate, with reference to federal estate and state inheritance taxes, and also in regard to the acquisition and disposal of the estate's securities and in regard to various matters pertaining to companies in which the estate held investments." But the executors might do all the things that the court found that they did and still not be engaged in "carrying on . . . business" within the meaning of the Revenue Act. For as we said in the *Higgins* case, "All expenses of every business transaction are not deductible. Only those are deductible which relate to carrying on a business." Also, we there sustained a holding that an individual who was engaged in financial and investing activities in all ways similar to those of the decedent and his executors in this case was not entitled to a deduction such as that sought by respondents. Therefore, the finding of the Court of Claims that the executors continued to conserve the decedent's estate as he had when he was himself "a financier and investor" falls far short of a finding that the executors were entitled to a deduction accorded by Congress only to those "carrying

on . . . business." Failure of the Court of Claims to make a specific finding on this ultimate and determinative issue deprives that court's judgment of support. Under such circumstances we are not called upon to weigh the different facts set out in the subsidiary findings in order to determine whether or not they would support a conclusion that the executors were "carrying on . . . business" within the meaning of the statute.[2]

When we turn to the opinion of the Court of Claims,[3] it is made clear that absence of such a specific finding was the result of the court's adoption of criteria of "carrying on . . . business" inconsistent with our holding in the *Higgins* case. Since the judgment must be vacated because not supported by adequate findings, it is appropriate that we point out this inconsistency. Accepting as true the statement of the Court of Claims that a broad definition of "business" might be that it is "whatever engages the time, attention, and labor of men in order to conserve what they have or to avoid loss" it does not follow at all that this is synonymous with the statutory language, "carrying on . . . business." This definition of "business" stems in part from the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, upon which the Court of Claims relied. But however applicable that definition may have been to the case there under consideration, it cannot be accepted as a guide in the present case. The reasons why it is not applicable to the statutory provision now under consideration were given in our opinion in the *Higgins* case; its non-applicability to specific situations has also been explained in a number of other opinions of this Court.[4]

Nor can the judgment of the Court of Claims be supported by that court's statement that the executors were engaged "in the business of conserving the estate and protecting its income." Such activities are the traditional duty of executors. Executors who engage actively in trade and business are the exception and not the rule. Rather obviously, there could be clear cases where executors "carry on . . . business" by continuing to operate a store, a factory or some other well known, well marked type of business activity.

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[2] United States v. Esnault-Pelterie, 299 U. S. 201, 206.

[3] Cf. Chippewa Indians of Minnesota v. United States, 305 U. S. 479, 481; American Propeller & Mfg. Co. v. United States, 300 U. S. 475, 479-480.

[4] See, e. g., Van Baumbach v. Sargent Land Co., 242 U. S. 503, 514-515; McCoach v. Minehill & Schuylkill Haven R. R., 228 U. S. 295, 303; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 190.

But in the absence of evidence showing activities coming within the general acceptation of the concept of carrying on a trade or business, it cannot be said as a matter of law that an executor comes into this category merely because he conserves the estate by marshalling and gathering the assets as a mere conduit for ultimate distribution. And determination of what constitutes "carrying on . . . business" under the Revenue Act does not depend upon the size of the estate or the number of people whose services are required in order properly to conserve it.

The judgment of the Court of Claims is vacated and the cause is remanded to that court for proceedings in accordance with the views herein expressed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.